85-558

No. ____

Supreme Court, U.S.
FILED
SEP 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT E. O'CONNOR and GLADYS E. O'CONNOR,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ALLAN I. MENDELSOHN
MARVIN L. SZYMKOWICZ
WARD & MENDELSOHN, P.C.
1100 - 17th Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 785-0200
Counsel for Petitioners

OF COUNSEL:
DWIGHT A. MCKABNEY
Apartado 3116
Balboa-Ancon
Republic of Panama

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

19 pp

QUESTIONS PRESENTED

1. Whether a provision of the Agreement in Implementation of the 1977 Panama Canal Treaty exempts United States citizen employees of the Panama Canal Commission from taxation by both the United States and Panama on their Commission income. This provision reads as follows:

> United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

2. Whether diplomatic correspondence may be introduced by the Government immediately before oral argument in the court of appeals where the Government itself is a litigant and where it repeatedly refused the trial court's urgings to obtain and introduce such matters below.

Note: The case caption contains the names of all the parties.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
TREATY AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AS TO THE PROPER INTERPRETATION OF THE PANAMA CANAL TREATY AND ARTICLE XV(2) OF ITS IMPLEMENTATION AGREEMENT	8
II. THE DECISION BELOW RAISES SIGNIFICANT AND POTENTIALLY RECURRING PROBLEMS CONCERNING EVIDENTIARY MATTERS THAT FEDERAL COURTS MAY PROPERLY CONSIDER IN CONSTRUING TREATIES	11
III. THE PRACTICAL CONSEQUENCES OF THE FOREGOING CONFLICT OF THE CIRCUITS WILL BE THE DIFFERENTIAL OPERATION OF THE FEDERAL TAX COLLECTION SYSTEM	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASE LAW: Page

Coplin v. *United States*, 761 F.2d 688 (Fed. Cir. 1985) ..... *passim*

Coplin v. *United States*, 6 Cl.Ct. 115 (1984) ..... *passim*

Harris v. *United States*, 768 F.2d 1240 (1985) 7, 8-14

Harris v. *United States*, 585 F.Supp. 863 (N.D. Ga. 1984) . 8-9

Sumitomo Shoji America, Inc. v. *Avagliano*, 457 U.S. 176 (1982) 11-12

TREATY DOCUMENTS:

Agreement between the United States of America and Panama In Implementation of Article III of the Panama Canal Treaty, September 7, 1977, T.I.A.S. No. 10031 ..... 2 and *passim*

Panama Canal Treaty between the United States of America and Panama, September 7, 1977, T.I.A.S. No. 10030 ..... 2-3 and *passim*

Senate Hearings on Panama Canal Treaty Before the Committee on Foreign Relations, 95th Cong., 1st Sess. (1977) at 50-51 ..... 3, 5

STATUTE:

United States Code, Title 26, Section 894(a) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

ROBERT E. O'CONNOR and GLADYS E. O'CONNOR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners Robert E. O'Connor and Gladys E. O'Connor pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Federal Circuit entered on May 10 and July 3, 1985, respectively.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 761 F.2d 688. That opinion reversed the judgment and opinion of the United States Claims Court (Chief Judge Kozinski presiding) which is reported at 6 Cl.Ct. 115.

JURISDICTION

The opinion of the Court of Appeals for the Federal Circuit was entered on May 10, 1985. A timely petition for rehearing was denied on July 3, 1985. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

Panama Canal Treaty between the United States of America and Panama, September 7, 1977, T.I.A.S. No. 10030:

Article III

Canal Operation and Management

* * * * *

9. The use of the areas, waters and installations with respect to which the United States of America is granted rights pursuant to this Article and the rights and legal status of the United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article signed this date.

* * * * *

Agreement between the United States of America and Panama In Implementation of Article III of the Panama Canal Treaty, September 7, 1977, T.I.A.S. No. 10031:

Article XV

Taxation

* * * * *

2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges

on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees, or other charges on income derived from sources outside the Republic of Panama.

* * * * *

United States Code Title 26, Section 894(a):

(a) Income exempt under treaty. - Income of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation under this subtitle.

STATEMENT OF THE CASE[1]

The 1977 Panama Canal Treaty was the culmination of negotiations that had commenced in 1964. Senate Hearings on Panama Canal Treaty Before the Committee on Foreign Relations, 95th Cong., 1st Sess. (1977) at 50-51 (hereafter referred to as "Hearings"). The Treaty provides that Panama will enjoy increasing territorial sovereignty over the Canal and that its sovereignty will become exclusive on December 31, 1999. Until then, the Canal is to be governed by the Panama Canal Commission. 761 F.2d at 689-90. Although denominated in the Treaty as an agency of the United States, four of the Commission's nine board members are Panamanian citizens, nominated by the Government of Panama. Treaty, Article III(3)-(10) and Article X(3).

Whether and how United States citizen employees of the Commission would be taxed was one of the last Treaty provisions to be agreed upon. As of June 24, 1977, all Treaty questions with the exception of "economic arrangements"

---

[1]Most record references will be to the two-volume record appendix used on appeal. The volumes will be designated as "I" and "II".

had been settled. R.II, 163. Taxation of United States citizen employees of the Commission was part of these "economic arrangements". *Id.*

Negotiations on the taxation issue were s[illegible]ed and, at times, acrimonious. Both the United States and Panama claimed a right to tax the U.S. citizen employees. R.I, 89. Panama viewed that right as an essential attribute of its impending sovereignty. R.I, 120-21. The chief U.S. negotiator, Ambassador Sol Linowitz, remonstrated that Panamanian taxation would mean a loss of revenue to the United States Treasury. R.I, 116-17. Internally, however, the U.S. negotiating team feared that permitting a foreign government to tax foreign-based U.S. citizen employees of a U.S. agency would set a "bad precedent".[2] R., 164.

The taxation impasse was finally resolved in negotiations held during mid-July and early August 1977. The Department of State has represented that there is a gap in the negotiating history: no contemporaneous record of any negotiating session is available after July 18, 1977. 6 Cl.Ct. at 131. Accordingly, the manner in which the impasse was resolved cannot be precisely determined. Nevertheless,

[2]Secretary Vance's confidential memorandum to the Policy Review Committee, dated July 19, 1977, expresses this concern:

> Panama has proposed that effective three years after entry into force of the treaty the United States citizens employed by the Canal Administration pay income taxes to Panama. They estimate these taxes at $7-10 million a year.
>
> The United States *could* acquiesce to Panamanian taxation of its U.S. employees. However, United States Government employees are exempted from host country income taxes throughout the world. Making Panama an exception would set a bad precedent for U.S. Government operations in other foreign countries. Secondly, we estimate that revenue generated from such taxation would amount to not more than $3 million per year.

when the negotiations ended in August 1977, the present language of Article XV(2), exempting Commission salaries from "any" taxes, had somehow managed to reconcile the conflict of views.

Following its adoption, Article XV(2)'s exemption language attracted attention from officials throughout the U.S. Government. Attorneys in the Treasury Department, appreciating that the language created an apparent reciprocal tax exemption, recommended a clarification. R.I, 58-59. The recommendation was not acted upon. During hearings on the Treaty before the Senate Foreign Relations Committee, Senator Stone also recommended a clarification. His recommendation was based on published press reports that U.S. residents of the then Canal Zone expressed "glee" on learning that Article XV(2) created a reciprocal tax exemption. Senator Stone's recommendation was not acted upon. Hearings at 268-69.

When this proceeding was before the Claims Court, Judge Kozinski urged the U.S. Government to seek some clarification from Panama on the meaning of the provision. That request, too, was not acted upon.[3]

---

[3]A portion of the Court's colloquy with Government counsel is reprinted below (Transcript of March 8, 1984 at pp. 43-47):

> Court: I am giving you the opportunity to obtain from Panama their understanding as to the meaning of this provision. That is what I gave your attorney two weeks ago. It is done all the time for one Government to get a diplomatic note from another Government saying we had a Treaty provision and this is what it means. If you don't want to get it, I will draw whatever inferences can be drawn from the refusal to obtain that.
>
> Mr. Peyser: I think the case should be decided on the materials before the Court.
>
> Court: So I am going to ask you one more time, Mr. Peyser, do

Differences concerning the interpretation of Article XV(2) exist even between the treaty negotiators of the two nations. An affidavit by Dr. Carlos Alfredo Lopez Guevara, Ambassador Extraordinary and Plenipotentiary, one of the principal Panamanian negotiators who was present at the negotiating table when the provision was finally adopted, was presented in the trial court. R.II, 192-93. Ambassador Lopez Guevara stated that the language of Paragraph XV(2) was intended to preclude both the United States and Panama from taxing Americans and that it was so understood by Panama.[4] The United States' explanation, ad-

---

you wish to take advantage of the opportunity to supplement the record by obtaining a clarification of Panama's understanding of the Treaty language? If you wish, have a few days or a week to go back and check on that. I will give it to you, but I want a concise and clear yes or no answer from the United States.

Mr. Peyser: No. No, your Honor.

* * *

Mr. Peyser: I don't [think] the opinion of any official in Panama in 1984 is persuasive.

Court: . . . All I can gather is that you don't think you are going to get from Panama the interpretation that you want.

Mr. Peyser: I have no idea what the response would be from Panama.

Court: Well, would you like to go find out?

Mr. Peyser: I decline the invitation to do that. I understand you are asking if we would like to do that, and the answer is, no. I don't think it would be appropriate or necessary.

[4]Similar views were incorporated in sworn statements from Juan Antonio Tack, Minister of Foreign Relations (and head of the Panamanian negotiating staff between 1970 and 1976) and from Demetrio B. Lakas, Panama's then President. R.II, 183-91.

vanced by the State Department's now Deputy Legal Advisor Michael Kozak,[5] was that the Panamanian government simply acceded to the U.S. view that it alone could impose taxes on citizen employees of the Commission. R.I, 89-90.

The O'Connors brought suit in the U.S. Claims Court for refund of taxes paid with respect to income earned by Mr. O'Connor, as a Commission employee, during the year 1981. The basis for their refund claim was the language of Article XV(2). Judge Kozinski granted summary judgment in the O'Connor's favor in the amount of $7,959.00, representing the federal income taxes paid by the O'Connors on the 1981 Commission salary. The United States appealed to the United States Court of Appeals for the Federal Circuit, where the appeal was consolidated with *Coplin*. 761 F.2d at 689. There are over 200 other similarly situated taxpayer suits pending in the Claims Court. All these actions await this Court's disposition of this petition.

Oral argument was held below on Monday, March 4, 1985. On February 28, 1985, however, the U.S. Government, as part of its Reply Brief, informed the Court that on February 25, 1985 the United States received diplomatic correspondence from the Panamanian Foreign Minister indicating that, on the basis of an inquiry he had made of three of Panama's treaty negotiators, the Foreign Ministry shared the United States view that Article XV(2) was not a reciprocal exemption. Petitioners moved to strike the correspondence from the record.[6]

[5]Mr. Kozak was a member of the U.S. team negotiating the treaty, but was "not present at any negotiating session during which the substance of Article XV was discussed". *Harris* v. *United States*, 760 F.2d at 1246, 1247.

[6]The basis of the motion to strike was that petitioners had not had an opportunity to inquire into the provenance of the diplomatic correspondence or to challenge its validity in light of the contrary view expressed in 1984 by the then Foreign Minister of Panama.

On May 10, 1985, the Federal Circuit denied petitioners' motions to strike and reversed Judge Kozinski's decision. Writing for the five-member panel, Judge Bissell found that:

> "[T]he record now reveals the intent of each government. Since both treaty parties agree that paragraph 2 was not intended to create an exemption from United States domestic taxation, the trial court's decision cannot be upheld."

761 F.2d at 692. Judge Bissell ruled that, notwithstanding the circumstances, the Court was permitted to consider the diplomatic correspondence because of the Court's powers to take judicial notice of "'the public acts and proclamations of (foreign) governments'". 761 F.2d at 691. In a concurring opinion, in which Judges Rich and Baldwin joined, Judge Nies concluded that she did not find it necessary to consider the diplomatic note. "A complete reading of the record, the treaty and the Implementation Agreement leads me to conclude that Article XV had no relevance to taxation by the United States of its own citizens". 761 F.2d at 692.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AS TO THE PROPER INTERPRETATION OF THE PANAMA CANAL TREATY AND ARTICLE XV(2) OF ITS IMPLEMENTATION AGREEMENT

The United States Court of Appeals for the Eleventh Circuit, on August 14, 1985, rendered a decision in *Harris* v. *United States*, 768 F.2d 1240 (1985) on issues identical to those presented below. As in *Coplin*, the plaintiffs were U.S. citizen Commission employees who, on the strength of Article XV(2), sought refunds of federal taxes paid on their Commission salaries. As in *Coplin*, the trial court entered

judgment for the taxpayers, holding that the language of Article XV(2) was "unmistakably clear". 585 F.Supp. 863. The decisions conflict on two material questions of law.

1. The Federal Circuit's decision in *Coplin* directly conflicts with *Harris* on the central question of the interpretation of Article XV(2). Judge Nies's concurring opinion (representing the views of a majority of the Court) concluded that, based on the Claims Court record alone, Article XV(2) should be judicially re-titled as "Taxation by the Republic of Panama", rather than "Taxation" *simpliciter*.

By contrast, the Eleventh Circuit found the clear meaning of Article XV(2)'s use of the term "taxation" to be taxation by both Panama and the United States. It reached its conclusion based on the following considerations:

(a) the "clear and sweeping terms" of Article XV(2);

(b) the contrast between the inclusive language of Article XV(2) and several other provisions of the Treaty package where taxing powers were expressly accorded or limited to one nation or the other;

(c) the fact that the United States was represented by a "distinguished negotiating team", rendering it highly unlikely that "inadvertence or oversight" caused a drafting error;

(d) the affidavits of Dr. Lopez Guevara and other officials involved on the Panamanian side of the negotiations (properly introduced in the district court) that indicated that Article XV(2) was intended to be a reciprocal tax exemption and was so interpreted by Panama;

(e) the U.S. Government's failures to clarify Article XV(2), despite repeated requests and opportunities to do so;

(f) the fact that American citizens employed in connection with Canal operations have historically enjoyed monetary incentives;

(g) the fact that potential tax revenues lost to the U.S. through a reciprocal exemption "may be considered slight" compared to the significant economic concessions made to Panama in the Treaty package, and that the number of Americans who will benefit by such an exemption will decline progressively until December 31, 1999, when U.S. participation in the Canal will be phased out entirely.[7]

Petitioners submit that when two Circuits interpreting the same treaty language find two different and totally contrary clear meanings, certiorari should be granted to resolve the conflict.

2. As in *Coplin*, the United States provided the diplomatic correspondence to the *Harris* court shortly before oral argument. Unlike the Federal Circuit, however, the Eleventh Circuit declined to consider it. The Court found no reason to relax the prohibition limiting its appellate consideration to matters that were in the trial record. 768 F.2d at 1243 *et seq.*

3. In addition to the general desireability of resolving Circuit conflicts, petitioners submit that uniformity of decision among the circuits is particularly necessary in the law of treaties and international executive agreements. This petition should be granted in order to establish a single United States position on a treaty controversy affecting *both* Commission employees and the interests of the Republic of Panama.

---

[7]In *Harris*, as in *Coplin*, the Government relied upon some ten earlier lower court decisions to support its view of Article XV(2). *Harris* discounted these earlier holdings (none of which was appealed), observing that they were all reached before Judge Kozinski required the State Department to declassify all non-confidential Treaty negotiating history and before the views of Ambassador Lopez Guevara and his colleagues became available.

II. THE DECISION BELOW RAISES SIGNIFICANT AND POTENTIALLY RECURRING PROBLEMS CONCERNING EVIDENTIARY MATTERS THAT FEDERAL COURTS MAY PROPERLY CONSIDER IN CONSTRUING TREATIES

Since the end of World War II, there has been a marked increase in the number of treaties and executive agreements to which the United States is a party. Many of these, as here, relate to private rights, in contrast to public international law. The result has been substantial increased litigation. The *Harris* case and the earlier suits on the same issue are but a few examples. A "Westlaw" search conducted in connection with this Petition indicates that during the decade from 1970 through 1979, there were 195 reported federal court decisions in which the term "treaty" appeared within five words of some variant of the term "interpret" or "construe". The same search conducted only for the period January 1, 1980 to date discloses the same combination of terms in 218 cases.

The conflict between *Harris* and *Coplin* reflects deep judicial uncertainty over the proper rules of evidence and procedure applicable to treaty interpretation. One of these questions is whether *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982) — where the Executive Branch was allowed to introduce a Japanese Government diplomatic note at the appellate level — must be followed in all circumstances. The government relied on *Sumitomo* in both *Harris* and *Coplin* in urging that the extra-record correspondence be considered. *Harris* and *Coplin* adopted diametrically opposed positions on the issue. In *Harris*, the Eleventh Circuit ruled that the Panamanian diplomatic correspondence was subject to the usual rule excluding extra-record evidence from appellate consideration. It characterized the correspondence "as self-serving evidence outside the record, for which additional explanation is re-

quired". *Harris* at 1242. In contrast, *Coplin* ruled that the diplomatic correspondence was a fact capable of judicial notice at *any* time.

Subsumed within this conflict, moreover, are critical differences over several established rules of evidence that normally would have entitled the taxpayers below: (a) to test the competency of the three almost identical letters solicited by and relied upon by the Panamanian Foreign Minister in the diplomatic correspondence; (b) to challenge the manner in which and the reasons why the correspondence was obtained by the U.S. Government only on the eve of appellate oral argument; and (c) to inquire why the U.S. Government did not disclose to the *Coplin* or *Harris* courts that, in July 1984, Panamanian authorities appeared to take a position on the tax issue different than that advanced in the diplomatic correspondence. Petitioners believe that the Federal Circuit's approach below deprived them of established evidentiary rights and protections.

A final question is whether *Sumitomo* should apply where, as here, the United States is a party to the litigation. *Sumitomo* was private party litigation in which the United States appeared as *amicus curiae* to present the views of the Department of State and the Government of Japan. It did not have a financial stake in the outcome of the litigation.

We respectfully suggest that these are important and potentially recurring issues that are worthy of briefing and reasoned consideration by this Court.

III. THE PRACTICAL CONSEQUENCES OF THE FOREGOING CONFLICT OF THE CIRCUITS WILL BE THE DIFFERENTIAL OPERATION OF THE FEDERAL TAX COLLECTION SYSTEM

A failure definitively to resolve the conflict in interpretation of Article XV(2) will have substantial adverse consequences on the federal tax collection system including:

(a) U.S. citizen Commission employees domiciled in the three states comprising the Eleventh Circuit (i.e. Florida, Georgia and Alabama) will be exempt from taxes that citizen Commission employees domiciled in other states will be required to pay;

(b) U.S. citizen Commission employees who filed refund suits in the Claims Court will be denied refunds that will be granted to citizen employees who filed, or will file, their suits in the Eleventh Circuit.

(c) hundreds, if not thousands, of U.S. citizen Commission employees who presently reside in Panama or somewhere in the U.S. outside the Eleventh Circuit will exercise their constitutional right to change their residence and to domicile themselves in one of the states of the Eleventh Circuit in order to benefit from the *Harris* ruling.[8]

Apart from their inherent harm, these consequences, and their attendant publicity, will further erode public confidence in the federal income tax system.

---

[8]When the Treaty entered into force in October 1979, there were approximately 3,300 U.S. citizen employees of the then Panama Canal Zone. Today, there are approximately 1,400 citizen employees of the Commission. The total payroll for these individuals during the period October 1, 1979 to date is approximately $400 million.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ALLAN I. MENDELSOHN
MARVIN L. SZYMKOWICZ
WARD & MENDELSOHN, P.C.
1100 - 17th Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 785-0200
Counsel for Petitioners

OF COUNSEL:
DWIGHT A. MCKABNEY
Apartado 3166
Balboa-Ancon
Republic of Panama